No. 77-1087

In the Supreme Court of the United States

OCTOBER TERM, 1977

ELIAS EWANCO, PETITIONER

v.

COMMISSIONER OF PATENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. Petitioner brought this suit in the United States District Court for the District of Columbia, pursuant to 35 U.S.C. 145, after the United States Patent Office's Board of Appeals had affirmed a Patent Examiner's decision denying him a patent. The items sought to be patented are two decks of playing cards with an alphabet letter on each card and a number denoting the letter's position in the alphabet. The cards are intended to be used by pre-school children. Because two patents had been issued for similar decks of playing cards, the Board of Patent Appeals denied petitioner's application on the grounds that one deck (Claim 7) failed to meet the requirement of 35 U.S.C. 102 that the invention not be anticipated in the art, and that both decks (Claims 7 and 13) failed to meet the requirement of 35 U.S.C. 103 that

the subject matter of the application not be obvious (Pet. App. B). The district court held that neither deck of cards is patentable under 35 U.S.C. 103 (Pet. App. C).[1] The court of appeals affirmed (Pet. App. D).[2]

2. Under 35 U.S.C. 103, an application must be denied "if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which such subject matter pertains." *Graham* v. *John Deere Co.*, 383 U.S. 1, held that three basic factual inquiries are essential to consideration of obviousness: (1) the scope and content of the prior art; (2) the differences between the prior art and the claim at issue; and (3) the level of ordinary skill in the pertinent art. The Board of Patent Appeals, the district court and the court of appeals all gave careful consideration to petitioner's claims and each held that his cards failed the test of obviousness. It is obvious that letters and numbers can be placed together on playing cards, and there is nothing unique in petitioner's cards. Cf. *Sakraida* v. *Ag Pro, Inc.*, 425 U.S. 273. Petitioner raises no question of general importance and there is, accordingly, no reason to review the denial of his application.

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[1]The district court did not reach the question whether 35 U.S.C. 102 also required a finding that Claim 7 is unpatentable.

[2]Petitioner did not raise the denial of Claim 7 on appeal (Pet. App. 17D; Pet. 4).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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